IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 21, 2008

ANGELEE PRATER v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Rhea County
No. 16293 J. Curtis Smith, Judge

No. E2007-02184-CCA-R3-PC - Filed January 12, 2009

Petitioner, Angelee Prater, appeals the post-conviction court's dismissal of her petition for post-conviction relief. In her appeal, Petitioner argues that her trial counsel provided ineffective assistance of counsel for failing to interview potential witnesses and to seek funding for an expert witness. After review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Philip A. Condra, District Public Defender; Michelle Story, Assistant Public Defender, and Jeffrey Harmon, Assistant Public Defender, Jasper, Tennessee, for the appellant, Angelee Prater.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; James Michael Taylor, District Attorney General; Dorothy M. Ray, Assistant District Attorney General; and Will Dunn, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Following a jury trial, Petitioner was convicted of aggravated child abuse and was sentenced as a Range I, standard offender, to twenty-one years and six months. The evidence supporting Petitioners's conviction was summarized by a panel of this Court in Petitioner's direct appeal as follows:

> On July 20, 2000, the appellant took her son, three-and-a-half-year-old D.P., to Dayton Pediatrics in Dayton, Tennessee, where he was seen by nurse practitioner Guy Lewis. At the appointment, the appellant requested a change in the medication

that was prescribed to treat D.P.'s attention deficit hyperactivity disorder ("ADHD"). She complained that D.P. was overactive despite taking Dexedrine, an amphetamine used to control the symptoms of ADHD. At that time, Mr. Lewis prescribed .1 milligram of Clonidine for D.P. to be taken at bedtime. The dosage prescribed to D.P. was the lowest dosage of Clonidine available. The drug was prescribed to help calm the effects of Dexedrine and to help D.P. sleep.

The doctor normally in charge of Dayton Pediatrics, Dr. Nelson, was on medical leave in July of 2000 so Dr. John Netterville was in charge of supervising Mr. Lewis. Dr. Netterville is a behavior pediatrician who runs the Attention and Behavior Clinic in Nashville, TN. Dr. Netterville supervised Mr. Lewis by traveling to the clinic once a week and answering any questions by telephone.

Clonidine is a drug approved by the Federal Drug Administration to control high blood pressure. Some doctors, however, prescribe Clonidine to treat ADHD in children because of the calming effect of the medication even though this use is listed as an "unlabeled" or "unapproved" use for the drug in the Physician's Desk Reference, a guide commonly utilized by doctors in determining which medication to prescribe for a patient. Two doctors, Dr. Netterville and Dr. Billy D. Arant, Chairman of the Department of Pediatrics at T.C. Thompson Children's Hospital in Chattanooga, explained that the FDA has not approved Clonidine for use in children under twelve because it is not cost effective for the drug companies to do tests on children. According to Dr. Arant, approximately eighty percent of the drugs listed in the Physician's Desk Reference are not approved for children; thus, if doctors were restricted to using drugs that had been approved, they could almost never prescribe drugs for children. Both Dr. Arant and Dr. Netterville testified that Clonidine may be prescribed for children as young as D.P. In fact, Dr. Netterville commented, "in the dose we use with the kids it's a real safe drug."

When the appellant filled the prescription for Clonidine at a local grocery store, the instructions on the package were to administer one tablet daily at bedtime. The instructions further stated:

> Follow the directions for using this medicine provided by your doctor. This medicine may be taken on an empty stomach or with food. Store this medicine at room temperature in a tightly-closed container, away from heat and light. If you miss a dose of this medicine, take it as soon as possible. If it is almost time for your next dose, skip the missed dose and go back to your regular dosing schedule. Do not take two doses at once. If you miss two or more doses in a row, contact your doctor.

The accompanying drug information listed several possible side effects of Clonidine including: "dry mouth, drowsiness, dizziness, tiredness, headache, or constipation." The warnings also included the following language, "Accidental overdose of Clonidine is an increasing cause of poisoning in children three and under. If overdose is suspected, contact your local poison control center or emergency room immediately. Symptoms of overdose may include slowed heartbeat, weakness, sleepiness, vomiting, and constricted pupils."

On the morning of July 25, 2000, five days after D.P. was prescribed Clonidine by Mr. Lewis, the appellant called Dayton Pediatrics to confirm the dosage of Dexadrine and Clonidine that she was supposed to administer to D.P. each day. Mr. Lewis instructed the appellant to give D.P. only one tablet of Dexedrine and one tablet of Clonidine per day. The appellant called back that afternoon around 2:00 p.m., requesting permission to increase the dose of Clonidine to two tablets because D.P. would not go to sleep. Mr. Lewis conferred with Dr. Netterville, who was at Dayton Pediatrics that day. Dr. Netterville responded, "... absolutely not. You give one tenth of a milligram of Clonidine once a day and that's all you use." Mr. Lewis communicated this to the appellant. The appellant called again at 4:00 p.m. and asked a nurse if she could increase the dosage of Clonidine. The nurse asked Dr. Netterville what to tell the appellant and he responded, "absolutely not. You give one pill of Clonidine and that's all you give." Dr. Netterville stood behind the nurse as she was talking to the appellant on the phone; he heard the nurse tell the appellant repeatedly that she could only give D.P. one tablet of Clonidine.

Two days later, on July 27, 2000, Stacey Raines drove her uncle Levon "Pete" Prater to pick up D.P. at a neutral location for visitation. Although Mr. Prater is not D.P.'s biological father, he is the only father figure D.P. has ever known and exercises visitation with the child every other weekend. When the two picked up D.P. at around 8:30 p.m. that evening, Ms. Raines described him as "a rag doll more or less," noting that D.P. was somewhat unresponsive and difficult to arouse.

Ms. Raines drove Mr. Prater and D.P. less than a mile to Wylene Rothwell's house. Ms. Rothwell is Ms. Raines's mother and Mr. Prater's sister. She runs a day care facility from her home. When D.P. arrived, Ms. Rothwell tried unsuccessfully to play with him for approximately fifteen to twenty minutes after his arrival. She described D.P. as "limp" and "like a little rag." He would fall over when she would try to set him up and did not respond even when immersed in a bath of cold water.

Ms. Rothwell and Mr. Prater took D.P. to the Rhea County Medical Center where a nurse took him directly to a trauma room due to the fact that he was "unresponsive," "lethargic," and "difficult to arouse." The nurse and a paramedic tried to stimulate D.P. by calling his name and rubbing his sternum with their knuckles, a technique used to elicit a response from an otherwise unresponsive

patient. D.P. did not respond to their voices or to the painful stimuli. D.P. did not cry or flinch when they inserted an IV to administer two doses of Narcan, a drug designed to reverse the effects of narcotics. The paramedic described D.P.'s condition as "unconscious, unresponsive to painful stimuli" and characterized the situation as "life-threatening."

D.P. began to respond somewhat after being administered the Narcan. However, because of his condition, the attending physician decided to transport D.P. to Thompson Children's Hospital in Chattanooga by helicopter.

When D.P. arrived in Chattanooga, his situation was somewhat improved although he "was not totally aware of what was going on." D.P.'s heart rate was somewhat erratic, varying between slow and normal and he had some "pauses or irregular heart beat so he was not fully conscious." Dr. Arant testified that D.P. had "some effects compatible with a history of ingesting a drug called Clonidine." Although D.P. could be aroused when he arrived in Chattanooga, he would go back to sleep and "would not stay awake without repeated stimulation." When asked if D.P. was in a life-threatening situation, Dr. Arant testified that "he was at risk, yes." Although he agreed that D.P.'s side effects could be from a normal dose of Clonidine, he testified that D.P. exhibited "all the symptoms and signs" of Clonidine toxicity. He testified that such an adverse reaction to the smallest doses of Clonidine would be unusual and that if such a reaction were to occur, it would occur with the first dose.

D.P. was observed in the emergency room from 1:00 a.m. to 5:00 a.m., when he was moved to a regular room. Dr. Arant explained that there was not a "real good antidote that reverses" the effect of Clonidine and that you have to basically "support the child anyway you can until the drug runs its course." D.P. was supported by intravenous fluids which helped to keep his blood pressure up and heart beat normal. The toxicology report performed in Chattanooga did not reflect Clonidine in D.P.'s system, but Dr. Netterville testified that Clonidine would not show up on the toxicology report because D.P. was not specifically tested for this drug. D.P. was discharged twelve hours after his arrival in Chattanooga with normal vital signs.

According to the medical records, the appellant reported that she gave D.P. twice his normal dosage of Clonidine every night for a week as directed by her doctor's office. Dr. Arant felt that if this were actually the case, D.P. would have exhibited the same signs on each occasion he was given a double dose. He explained that the "effects [of Clonidine] are amassed" when the drug is given at bedtime and that after sleeping for eight hours the effects of the drug would wear off. When asked what the effect would be if D.P. were given two pills per night for several nights, Dr. Arant replied:

> ... if he got that effect with two pills on the 27th, then he got it on the 26th, and the 25th, and the 24th, and the 23rd, so he got that every night, but he was asleep and nobody was monitoring him or realized that he was at risk of dying.

Dana Morgan, an investigator with the Department of Human Services, met with the appellant at the hospital in Chattanooga on July 28, 2000. She made the following notes from her interview with the appellant, which she read at trial over objection by the appellant:

> Worker talked with ... [the appellant] at the hospital. She states that Pete [Levon Prater] called and stated that he wanted ... [D.P.]. She stated that she was not going to let him go. She stated later that she took a shower and he called again and wanted to get him. She stated that she asked Glenna [the appellant's friend] to take him over there to meet Pete. She stated that she then decided to call Roger ... McFarland and see what he was doing and he had asked her out for dinner. She stated that someone by the name of Scott with 911 called her at Roger's house shortly after arriving and told her that they were airlifting ... [D.P.] to Chattanooga. She stated that when she got to the hospital ... [D.P] asked her to take him home. She stated that the people that airlifted him said that he was alert and fine. She said that Officer Cranfield was there and asked Pete if he had been drinking. She stated that some nurse, she thinks her name is Dee-Dee asked her if ... [D.P] had got some of her Valium. She said that Pete told the nurse that ... [the appellant] was taking Valium and she got very upset when this was brought up. She stated that she told the nursing staff that she wanted Pete out of ... [D.P.'s] room. She did not want ... [D.P] in the presence of Wylene, which is Pete's sister, Sam, because she is a drunk.... She stated that the doctor said that ... [D.P's] blood level look [sic] fine. She said that Roger took her to Erlanger .... [the appellant] reported that she was with ... [D.P.] the entire time at Erlanger. She stated they were going to release him at 4:45 a.m., but his heart beat was erratic and they decided to admit him for observation. Worker asker her about ... [D.P's] medicine and she said they were in a lock box at her home. She said she was advised by Guy Lewis to give him one Dexedrine pill in the morning and two Clonidine at night. Worker ask [sic] how many ... she had left of the pills and she stated that she does not remember because she's [sic] not counted. Worker ask [sic] if she had talked to Doctor Nelson's office and she stated that she had called three or four days ago, because ... [D.P.] was not sleeping and not wanting to go to bed. She said that she had given two Clonidine pills somewhere between five

> and seven p.m., Tuesday 7-27.... Worker then went back to her conversation with Dr. Nelson's office and she stated that she wanted his Dexedrine increased but then decided she wanted the Clonidine increased.... She had stated sometimes my mind does not work so well, am I suppose to give him two Clonidine and she had called the office ..., Doctor Nelson's office and asked about his Clonidine and then she called the office ... and asked him to have his Clonidine increased but they refused to do that.
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> Despite the statement taken by the worker, the appellant later maintained to Ms. Morgan that Mr. Lewis told her to increase the Clonidine to two pills.
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> Ms. Morgan instructed the appellant to retrieve the remaining pills from the lock box in her home. There were fourteen Clonidine pills and eight Dexedrine pills left. According to the prescription, only eight of the thirty Clonidine pills should have been missing by July 27, 2000. Instead, there were sixteen pills missing.

State v. Prater, 137 S.W.3d 25, 27-31 (Tenn. Crim. App. 2003) (footnote omitted).

II. Post-Conviction Hearing

Shirley Brooks testified at the post-conviction hearing that she had known Petitioner "forever." Ms. Brooks stated that she lived with Petitioner, D.P., and Glenna King for approximately three months after she separated from her husband. Ms. Brooks observed Petitioner with D.P. and described their relationship as "wonderful." Ms. Brooks said that immediately prior to D.P.'s hospitalization, D.P. seemed "as normal as any child, there was nothing wrong with him."

Ms. Brooks and Ms. King drove D.P. to meet Mr. Prater at the predesignated spot on the night that D.P. was taken to the emergency room. When they arrived at the site, Ms. Brooks raised the seat up, and Mr. Prater removed D.P. from the car. Ms. Brooks said that D.P. was not acting unusual or sleepy and stated that D.P. had talked to her and Ms. King as they drove to meet Mr. Prater. Ms. Brooks said that Petitioner's trial counsel never contacted her about her potential testimony.

On cross-examination, Ms. Brooks acknowledged that she did not know what kind of medication D.P. was on and had never seen Petitioner administer any medicine to D.P. Ms. Brooks was not aware that the Department of Children's Services was visiting Petitioner's home for a period of time before D.P.'s hospitalization.

Katherine Sherrill, a long-time friend of Petitioner's, testified that she had been subpoenaed to testify at trial and was present in the courthouse during Petitioner's trial. However, Ms. Sherrill stated that Petitioner's trial counsel did not interview her prior to trial to ascertain the scope of her potential testimony. Ms. Sherrill said that at the time of the offense, Petitioner was babysitting her

daughter while Ms. Sherrill was at work. Ms. Sherrill stated, however, that she was not present at Petitioner's house on the evening that D.P. was hospitalized.

On cross-examination, Ms. Sherrill said that she was aware that D.P. was taking Dexedrine and Clonidine. On one occasion, Ms. Sherrill observed Petitioner give D.P. one pill of his "bedtime medicine" but acknowledged that this observation did not occur on the day D.P. was hospitalized. Ms. Sherrill was not aware that Petitioner had admitted to Ms. Morgan that she gave D.P. two Clonidine pills prior to his hospitalization.

Petitioner testified that she retained trial counsel to represent her in 2000 after she was arrested for the charged offense. Petitioner said that she met with trial counsel at his home office three times prior to trial and spoke with him on the telephone several times. Petitioner said that she last met with trial counsel approximately three or four months before trial, and she last spoke with him on the telephone approximately one month before trial.

Petitioner said that she gave trial counsel a lengthy witness list which included Mr. Prater, Ms. Brooks, Ms. Sherrill, Ms. King, Donnie Moore, Ray Woody, and Nancy Sullivan. Petitioner told trial counsel that several children whom she had previously babysat were willing to favorably testify about Petitioner's care, but trial counsel decided not to call these witnesses to testify at trial.

Petitioner stated that she wanted to testify on her own behalf at trial, but trial counsel told her that if she took the stand "that he would drop [Petitioner] where [she] stood." Petitioner interpreted this comment to mean that trial counsel would no longer represent her if she testified, so she decided against it.

Petitioner testified that she told trial counsel that she had been taking D.P.'s Dexedrine instead of giving the medicine to D.P. Petitioner explained that she had planned a trip to Memphis at the time of the offense. Petitioner stated that she called the doctor's office to request that D.P.'s Dexedrine dosage be increased so that she could refill the prescription before leaving town. Petitioner said that the doctor told her "absolutely not," but then told her to increase the dosage for Clonidine instead of increasing the Dexedrine. Petitioner stated that before the offense, Guy Lewis, the nurse practitioner, had stopped her daughter's medicine while Dr. Nelson was away which endangered her daughter's health. Petitioner said that she told trial counsel about the incident, but trial counsel did not cross-examine Mr. Lewis on that topic.

Petitioner stated that Tammy Rutledge from the Department of Children's Services visited her home once a week, and she frequently spoke with Ms. Rutledge by telephone. It was Petitioner's understanding that Ms. Rutledge kept records documenting her visits. Trial counsel, however, did not call Ms. Rutledge as a witness.

Petitioner stated that she discussed the elements of the charged offense with trial counsel, and he told her, "Don't worry about it, they cannot prove that you knowingly tried to hurt your child." Petitioner said that trial counsel promised her that she would not be found guilty and would not go

to jail. Petitioner said that she did not know the length of sentence she was facing if she were found guilty. Petitioner said that she asked trial counsel several times, including the day of trial, if it was possible to enter into a negotiated plea agreement. Trial counsel said that a plea agreement was "not up for discussion," and he refused to discuss the issue with Petitioner.

On cross-examination, Petitioner stated that trial counsel did not tell her that the State refused to enter into plea negotiations. Petitioner explained that the visitations by the Department of Children's Services were prompted when she became intoxicated at a friend's house. Her son, Christopher, was removed from her home and temporarily sent to live with her brother. Petitioner attended court-ordered parenting classes and AA meetings for two weeks and then regained custody of her son with weekly monitoring by Ms. Rutledge.

Petitioner acknowledged that she was not concerned about D.P.'s problems with ADHD when she began taking the child's Dexedrine prescription. Petitioner insisted that the State's witnesses lied when they testified at trial that Petitioner called repeatedly to request that the Clonidine dosage for D.P. be increased , and that they told her "absolutely not." Petitioner insisted that the medical staff told her on two separate occasions not to increase the Dexedrine, but to increase the Clonidine to two pills each night for ten nights.

At the post-conviction hearing, Petitioner denied that she gave D.P. two Clonidine pills on the night her son was taken to the hospital. Instead, Petitioner said that Ms. King gave D.P. the double dose of Clonidine that night while Petitioner was in the shower. Petitioner said that Ms. King was standing next to her while she was talking to the doctor's office and overheard the medical staff tell Petitioner to increase the Clonidine dosage to two pills. Petitioner acknowledged that Dana Morgan with the Department of Children's Services testified that Petitioner admitted to Ms. Morgan that she had given D.P. two Clonidine pills between 5:00 p.m. and 7:00 p.m. before D.P. was hospitalized. Petitioner insisted, however, that she told Ms. Morgan and trial counsel that Ms. King had administered the overdose.

Petitioner said that Mr. Prater and Ms. King always gave D.P. his medicine because D.P. would spit the pills out if Petitioner gave them to him. Petitioner said that her trial counsel told her that he did not want this information revealed at trial because it would appear that Petitioner could not control D.P. Petitioner acknowledged that either Ms. King or Mr. Prater gave D.P. two Clonidine pills for four or five days immediately preceding his hospitalization. Petitioner said that the sixteen missing Clonidine pills included two pills which she gave to Ms. King, telling Ms. King that the pills were Valium. Petitioner said that she did not consider how this would affect D.P.

On redirect examination, Petitioner testified that she would never have given the two Clonidine pills to D.P. if she had known the dosage would be harmful to him.

Trial counsel testified that he was retained by Petitioner to represent her on the charged offense. The initial theory of defense was based on Petitioner's assertion that the medical staff had instructed her to give D.P. two Clonidine pills each night for ten nights. When the State's proof

revealed that several witnesses would testify otherwise at trial, trial counsel developed two other defense options. That is, that Petitioner was never told not to administer two pills at the same time, or, alternatively, that Petitioner was told to increase another one of D.P.'s medication which led to confusion. Trial counsel said that he kept these options open during the presentation of the State's case-in-chief.

Trial counsel confirmed that Petitioner gave him a list of potential witnesses, and he subpoenaed Ms. King and Ms. Brooks to testify at trial. Trial counsel acknowledged that he did not interview the women prior to trial, but Petitioner told him that they would testify that they had driven D.P. to meet Mr. Prater, and that D.P. was fine when they left. Petitioner also told trial counsel that Ms. King and Ms. Brooks would testify that they gave the two Clonidine pills to D.P. before they left Petitioner's house pursuant to Petitioner's instructions.

As the State's proof developed, trial counsel decided not to call Ms. King and Ms. Brooks as witnesses because he believed that his defense options would then be limited to confronting the medical witnesses and attempting to show that they were either lying or mistaken when they testified that they told Petitioner they would "absolutely not" increase the Clonidine dosage. Trial counsel said, however, that if Petitioner had elected to testify that the medical staff told her to give a double dose of Clonidine to D.P., then he would have called Ms. King and Ms. Brooks as witnesses.

Trial counsel said that he made a strategic decision not to call a representative of the Department of Children's Services to testify about Petitioner's good parenting skills. Trial counsel stated that would have opened the door for the State to inquire about the fact that the department was monitoring Petitioner's care of D.P., and that one child had been removed from her custody. Trial counsel stated that he had to "walk a thin line" throughout the trial to avoid giving the State any opportunity to place unfavorable information before the jury about Petitioner's parenting skills, either through the introduction of Department of Children's Services' records or the cross-examination of any character witnesses. Trial counsel acknowledged that he did not review Ms. Rutledge's reports but felt that anything beneficial in the reports would not outweigh the harm that might arise if the reports were introduced as an exhibit at trial.

Trial counsel said that he did not have a specific recollection of the substance of his first meeting with Petitioner. He stated, however, that it was his usual practice to explain the charged offense and the potential sentence. Trial counsel recollected discussing the potential sentence periodically with Petitioner prior to trial. Trial counsel said that he talked with the State several times about a potential plea agreement, but the State consistently maintained that it would not make a settlement offer in this case.

Trial counsel said that he reviewed the medical records from the Rhea County Medical Center and Erlanger Hospital. Trial counsel said he decided not to call an expert witness to testify generally about reactions to Clonidine because his research led him to believe that a medical expert would not testify any differently than the State's witnesses. Essentially, trial counsel did not want to hand over to the State another expert witness who might support their case. Trial counsel

confirmed that he elicited from Dr. Arnett during cross-examination that a person could have the same reaction to Clonidine as D.P. after taking just one dose. Trial counsel also elicited information that the Federal Drug Administration did not recommend Clonidine for children under the age of twelve without close supervision.

Trial counsel said that he discussed with Petitioner the various consequences of electing to testify at trial, but it was ultimately her decision. Trial counsel did not remember making any statement that he would withdraw as counsel if Petitioner decided to testify and observed that the trial court would not have granted a motion to withdraw at that stage of the proceedings. Trial counsel informed Petitioner that her prior felony arson conviction would most likely be admissible on cross-examination. Trial counsel also was afraid that Petitioner's cross-examination would reveal her prior difficulties with her children, her behavior at Erlanger Hospital and the Rhea County Hospital on the night of D.P.'s admission, and the fact that she was taking D.P.'s Dexedrine medicine. Trial counsel said that he managed to suppress the annotations made by personnel at Rhea County Hospital on the medical records indicating that Petitioner was "argumentative, combative, [and] difficult to get along with."

Trial counsel believed that he vigorously cross-examined Ms. Raines and Mr. Prater. During cross-examination of Ms. Raines, trial counsel elicited information that Ms. Raines drove Mr. Prater to pick up D.P. because Mr. Prater had been drinking, and that Ms. Raines had a past conviction for shoplifting. Trial counsel stated that he also vigorously cross-examined Mr. Lewis and did not recollect Petitioner telling him that Mr. Lewis had taken her daughter off her medication.

On cross-examination, trial counsel stated that it was his recollection that Petitioner initially wanted to testify on her own behalf, but decided against doing so after they discussed the various scenarios that might occur. Trial counsel denied that he ever told Petitioner that the jury would find her not guilty of the charged offense.

Trial counsel said that he reviewed the time period during which D.P. was in Mr. Prater's custody and believed that Mr. Prater took D.P. to the hospital approximately forty-five minutes after D.P. was picked up. Trial counsel said that even if there was testimony that D.P. was alert when Ms. King took him to Mr. Prater, there was never any indication that Mr. Prater had administered Clonidine to D.P. after he picked up the child. Trial counsel acknowledged that Petitioner's statement to Ms. Morgan included the comment that Petitioner never sent any medication with D.P. during his visitations with Mr. Prater.

Dr. James Nelson testified that his field of speciality was pediatrics, and he had been practicing medicine for twenty-two years. Dr. Nelson stated that Clonidine is prescribed for children with ADHD as a sleeping aid. The medicine altered the flow of blood to the brain and acted as a sedative. Dr. Nelson said that a child the size and age of D.P. would begin to grow drowsy between thirty minutes to an hour after taking the Clonidine pill. On cross-examination, Dr. Nelson acknowledged that he did not see D.P. during the week prior to his hospitalization.

Stacy Raines testified that she and Mr. Prater drove from her mother's house to the Corner Market in Morgantown, a distance of approximately one-fourth of a mile. Ms. Raines stated that D.P. was like a "rag doll." Ms. Raines drove back to her mother's house with D.P. and told her mother to watch the child because "something wasn't right with the baby." On cross-examination, Ms. Raines said that she was at her mother's house prior to picking up D.P.

Samantha Rothwell, Ms. Raines' mother, testified that she believed Ms. Raines was at her grandmother's house before she picked up Mr. Prater. Ms. Rothwell said that D.P. was limp when Mr. Prater brought him into the house between 9:00 p.m. and 9:15 p.m. Ms. Rothwell tried to wake D.P. up but was unable to get a response from the child. Ms. Rothwell noticed that D.P.'s eyes had rolled back into his head, and she placed him in the bathtub filled with cold water. Ms. Rothwell said that she and Mr. Prater transported D.P. to the Rhea County Hospital within forty minutes of D.P.'s arrival.

On cross-examination, Ms. Rothwell said that she did not know whether Ms. Raines left to pick up D.P. from her grandmother's house or her uncle's house because her mother and brother lived next door to each other. Ms. Rothwell acknowledged that the hospital records showed that D.P. was admitted at 10:51 p.m. Ms. Rothwell said that she and Mr. Prater had argued before taking D.P. to the hospital because Mr. Prater felt that he could not do that without Petitioner's permission. Ms. Rothwell was not aware if Mr. Prater was attempting to get custody of D.P. at the time of the incident. Ms. Rothwell said that Mr. Prater had been awarded visitation rights by the court just before the incident, and Petitioner had opposed the granting of visitation.

Ms. Rothwell said that Mr. Prater always took someone else along when he picked up D.P. because he and Petitioner would argue. Ms. Rothwell acknowledged that she did not get along with Petitioner. Ms. Rothwell said that Petitioner's trial counsel did not interview her prior to trial. Trial counsel contacted her after the trial to go over her deposition. Ms. Rothwell told trial counsel that there was no reason to meet because she had read the transcript, and there were no inaccuracies.

III. Standard of Review

Petitioner argues that trial counsel provided ineffective assistance at trial because he failed to interview Ms. Brooks prior to trial and failed to seek funding for an expert medical witness to testify about medicating children.

A petitioner seeking post-conviction relief must establish his allegations by clear and convincing evidence. T.C.A. § 40-30-110(f). However, the trial court's application of the law to the facts is reviewed de novo, without a presumption of correctness. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). A claim that counsel rendered ineffective assistance is a mixed question of fact and law and therefore also subject to de novo review. Id.; State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must establish that counsel's performance fell below "the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). In addition, he must show that counsel's ineffective performance actually adversely impacted his defense. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067 (1984). In reviewing counsel's performance, the distortions of hindsight must be avoided, and this Court will not second-guess counsel's decisions regarding trial strategies and tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). The reviewing court, therefore, should not conclude that a particular act or omission by counsel is unreasonable merely because the strategy was unsuccessful. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Rather, counsel's alleged errors should be judged from counsel's perspective at the point of time they were made in light of all the facts and circumstances at that time. Id. at 690, 104 S. Ct. at 2066.

A petitioner must satisfy both prongs of the Strickland test before he or she may prevail on a claim of ineffective assistance of counsel. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). That is, a petitioner must not only show that his counsel's performance fell below acceptable standards, but that such performance was prejudicial to the petitioner. Id. Failure to satisfy either prong will result in the denial of relief. Id. Accordingly, this Court need not address one of the components if the petitioner fails to establish the other. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

IV. Failure to Interview Witnesses

Petitioner argues that trial counsel's assistance was ineffective for failing to interview and call Ms. Brooks as a witness at trial. Ms. Brooks testified at the post-conviction hearing that Petitioner and D.P. had a "wonderful" relationship. Ms. Brooks accompanied Ms. King when the two women delivered D.P. to his father. Ms. Brooks said that D.P. was acting normally at that time and was not sleepy. Ms. Brooks testified, however, that she did not know what medicine D.P. was taking and had never seen Petitioner give him any medicine.

Trial counsel testified that he made a tactical decision not to call Ms. Brooks as a witness after Petitioner elected not to testify. Trial counsel's decision was based on his defense strategy of preventing the introduction of any evidence reflecting unfavorably on Petitioner and her parenting skills. Trial counsel believed that such an opportunity might have arisen if Ms. Brooks on direct examination had testified that Petitioner was a good mother.

The post-conviction court found that trial counsel's decision not to call Ms. Brooks as a witness was a tactical decision not subject to hindsight review, and that his conduct in this regard fell within the standards expected of defense counsel. The post-conviction court found that

> the State presented strong proof through Ms. Raines and Ms. Rothwell, and medical personnel that at the exchange and shortly thereafter, the child was lifeless and was suffering from an overdoes of a medication that only the petitioner had in her

possession. After the State finished its proof and the defendant chose not to testify, [trial counsel] decided not to confront the State's witnesses on the issue that the child was overdosed with medication but to question whether two pills were given, and whether even one pill could cause the child's symptoms.

Based on our review, we conclude that the evidence does not preponderate against the post-conviction court's finding that trial counsel's conduct in this regard was not deficient. Petitioner is not entitled to relief on this issue.

V. Failure to Secure Funds for an Expert Witness

Petitioner argues that trial counsel's assistance was ineffective because he failed to inform Petitioner that she could have potentially sought State funding for an expert medical witness pursuant to Rule 13 of the Tennessee Rules of the Supreme Court. See Tenn. R. Sup. Ct. 13(5)(a)(1) (providing that a trial court may in its discretion determine that expert services are necessary to protect the constitutional rights of a defendant who is entitled to appointed counsel). Petitioner acknowledges that her family retained trial counsel to represent her, but submits that trial counsel's conduct was deficient because he did not fully disclose the expenses above his attorney fees which would be incurred during his representation. Petitioner seems to suggest that the potential for State funds to secure the assistance of a medical expert may have affected her decision to request the appointment of counsel or accept the services of counsel retained by her family. Petitioner argues that trial counsel's error in this regard "denied her, at a minimum, the right to a hearing to determine whether there was a substantial need requiring assistance from the State."

The issue presented to the post-conviction court was whether trial counsel's assistance was ineffective for failing to make a written request for expert assistance "specifically, on the issue of adverse reactions to the victim's prescription medications." To the extent, therefore, that Petitioner argues on appeal that trial counsel was deficient for failing to explain the availability of the assistance of a State funded medical expert should she request the appointment of counsel, such issue is waived. See State v. Townes, 56 S.W.3d 30, 35 (Tenn. Crim. App. 2000), rev'd on other grounds State v. Terry, 118 S.W.3d 355 (Tenn. 2003) (concluding that issues not presented to the post-conviction court and are raised for the first time on appeal are waived).

Moreover, waiver notwithstanding, there is nothing in the record to indicate that Petitioner was indigent at the time of trial. See Steven Paul Deskins v. State, No. M2004-02638-CCA-R3-PC, 2005 WL 2546926, at *10 (Tenn. Crim. App., at Nashville, October 12, 2005), perm. to appeal denied (Tenn. Mar. 2, 2006) (observing that "only indigent defendants are entitled to state funds for expert services). Nor did Petitioner present any evidence at the post-conviction hearing to show what, if any, medical testimony would have benefitted her defense, or, even if such evidence existed, that it would have affected the outcome of the trial. Neither a trial judge nor an appellate court can speculate as to what a potential witness might have testified. Black, 749 S.W.2d at 757.

Based on our review, we conclude that Petitioner has failed to establish prejudice from trial counsel's failure to call an expert medical witness to testify at trial.

CONCLUSION

After a thorough review, we affirm the judgment of the post-conviction court.

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THOMAS T. WOODALL, JUDGE